Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DALE GEHRING,

Petitioner,

v.

J.I. CASE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the standard of causation for a multiple motive case brought under the Age Discrimination in Employment Act (ADEA) is the same as for a multiple motive case brought under Title VII of the Civil Rights Act of 1964 so as to require a multiple motive instruction in order to properly inform juries regarding a plaintiff's burden of proof in age cases. In *Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)*, a plurality held that the words "because of...an individual's sex" were not synonymous with "but for" causation in a multiple motive case. Although the ADEA also prohibits discrimination "because of...an individual's age," the Court of Appeals for the Seventh Circuit ruled that a "but for" cause instruction

was sufficient standing alone to adequately instruct a jury in a discharge case involving multiple motives in direct conflict with decisions of other courts of appeals.

Also presented is the question whether, under *St. Mary's Honor Center v. Hicks*, ___ *U.S.* ___, *113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)*, a judge should instruct the jury that it may infer age discrimination if it did not believe the employer's explanation for its decision. Although this inference is the pivotal question on which most discrimination cases turn, the Court of Appeals ruled that it was unnecessary to instruct the jury on this "permissible inference."

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Dale Gehring respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, recorded at 43 F.2d 340 (7th Cir. 1994), appears in the Appendix at A36 through A52. The judgment of the District Court and order denying plaintiff's motion for a new trial appear in the Appendix at A55 and A57.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on December 29, 1994 and a Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 30, 1995. (App. A53). The jurisdiction of this court is invoked under 28 U.S.C §1254(1).

STATEMENT OF THE CASE

District Court

The petitioner, Dale Gehring, was the plaintiff in an age discrimination claim brought in the District Court under the Age Discrimination in Employment Act, 29 U.S.C. §621, et. seq. The respondent, J.I. Case Corporation, was the defendant in the District Court proceeding.

In June 1991, after 27-1/2 years of employment with J.I. Case, the petitioner was terminated during a reduction in the work force. Petitioner subsequently filed a suit in District Court alleging that his discharge was motivated by age discrimination because two younger employees were retained in positions for which he was more qualified. During the trial, J.I. Case claimed that petitioner was discharged because he was less versatile than the younger employees who

were retained. J.I. Case further claimed that petitioner's work performance was nonetheless satisfactory and that but for the reduction in force he would not have been discharged. Petitioner not only rebutted defendant's testimony that he was less versatile than the two younger employees but he also introduced direct evidence of age discrimination. In particular, petitioner showed that he was discharged because J.I. Case believed he had "retired before his time" and that "he was resting on his laurels and past performance."

Given that petitioner's discharge involved multiple motives, petitioner asked the District Court to instruct the jury that age did not have to be the sole factor in the discharge decision but simply a factor that made a difference in the decision. (App. A63-A66).

Petitioner also asked the court to instruct the jury that it could infer discrimination if it disbelieved the employer's reasons for its decision. The District Court declined to give these instructions stating that the following instruction told the jury all it needed to know:

> You must decide whether plaintiff has shown by the greater weight of the credible evidence that he would not have been let go had it not been for his age. If your answer to this question is yes, then you have found that plaintiff's age was a

> determining factor in
> the termination of
> his employment.
> (App. A43 and A44)

An hour after retiring to deliberate, the jury asked the court whether age had to be the only determining factor or one of the determining factors in the discharge:

> Could you please
> clarify the question:
> Was plaintiff Dale
> Gehring's age a
> determining factor...
> Is it the only
> determining factor or
> one of the
> determining factor?
> (App. A44 and A72).

Petitioner asked the District Court to reply that there may be more than one

"determining factor" and that it should decide in his favor if age was among them. (App. A69 and A70). The judge again declined this instruction and instead told the jury that age had to be the but for cause of the plaintiff's discharge:

> By a determining factor I mean the plaintiff must prove he would not have been selected for layoff but for his age. (App. A44 and A45).

After twice being instructed that it was petitioner's burden to prove that age was the "but for" cause of his discharge, the jury returned a verdict for J.I. Case. The petitioner subsequently appealed the jury's verdict on the

grounds that the court's instructions imposed an erroneous and unreasonable burden.

Court of Appeals

The Court of Appeals affirmed the District Court's instruction imposing on petitioner the burden of proving but for causation without a benefit of a multiple motive jury instruction. While affirming the District Court, the Court of Appeals denounced the District Court's use of the words "a determining factor" as "arcane and cabalistic" stating that the words "pose but do not answer the very question this jury asked: What happens if more than one factor is at work?" The Court of Appeals then stated that the words "a determining factor" should be "red penciled" from ADEA jurisprudence and replaced by the following jury instruction:

> You must decide whether the employer would have fired [demoted, laid off] the employee if the employee had been younger than 40 and everything else had remained the same. (App. A49).

Rather than simplify the legal standard to a jury, this instruction imposes on plaintiffs the impossible task of having to identify the precise causal role a plaintiff's 40th birthday played in the employment decision. It misconstrues the ADEA as identifying 40 as the "bright line" where age discrimination, if it is to occur, will automatically kick in.

REASONS FOR GRANTING THE PETITION

A. The Court Of Appeals Decision Is In Conflict With This Court's Precedent Rejecting Imposition Of Unrefined But For Standard Of Causation On Plaintiffs In Multiple Motive Discrimination Cases.

In conflict with decisions of this court, the Court of Appeals incorrectly ruled that a "but for" cause instruction was adequate, without more, to instruct a jury where plaintiff's discharge was motivated by multiple factors. In *Price Waterhouse*, this court rejected a stark "but for" standard of causation for multiple motive cases brought under Title VII. This court noted that Title VII forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise discriminate with respect to his compensation, terms, conditions or

privileges of employment...<u>because of</u> such individual's...sex. 42 U.S.C. §2000e-2(a)(1). This court then reasoned that the words "because of" were not synonymous with "but for causation" since Congress could not have meant to obligate a plaintiff to identify the precise causal role played by each potential motive in an employment decision:

> We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words "because of" Congress meant to obligate a plaintiff to identify the precise causal role played by a

> legitimate and illegitimate motivation in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex based considerations in coming to its decision. *Id., 109 S.Ct. at 1785.*

With the exception of the word "age," §623(a)(1) of the ADEA is identical to the Title VII provision discussed in *Price Waterhouse*:

> It shall be unlawful for an employer -

> (1) To fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Given the identical wording of these two statutes, Congress could not have intended to impose a higher standard of causation for claims brought under the ADEA than for claims brought under Title VII. To the contrary, in *Lorillard v. Pons, 434 U.S. 575, 98 S.Ct. 866, 55*

L.Ed.2d 40 (1978) this court noted that there were "important similarities" between the substantive prohibitions of Title VII and the ADEA. The court explained that while the procedural and remedial provisions of the ADEA followed those of the Fair Labor Standards Act that the ADEA's substantive prohibitions "were derived *in haec verba* from Title VII." *Id., 98 S.Ct. at 872.* More recently, in *Hazen Paper Co. v. Biggins, ___ U.S. ___, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)*, this court cited Title VII cases for the proposition that ADEA liability is established where a plaintiff shows that age "actually motivated the employer's decision." *Id., 113 S.Ct. at 1706, citing United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S.*

248, 252-256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) and *Furnco Construction Corp. v. Waters, 438 U.S. 567, 576-578, 98 S.Ct. 632, 54 L.Ed.2d 490 (1978).*

The ADEA is also identical to Title VII in that both recognize that an employer may take a protected trait (sex and/or age) into account when the protected trait is a "bona fide occupational qualification" (BFOQ) reasonably necessary to the normal operation of the particular business or enterprise. In *Price Waterhouse* this court found that the BFOQ exception supported its interpretation that the words "because of" were not synonymous with "but for" causation. *Id. at 1786.* This same rationale also applies to the words "because of" found in the ADEA.

In requiring petitioner to prove that age was a but for cause of his

discharge without instructing the jury that age need only be one of the determining factors if they found multiple motives at play, the Court of Appeals carved out new law. The but for standard of causation imposed on this petitioner is in conflict with this court's decision in *Price Waterhouse* as well as this court's decision in *Hazen Paper Co.* which defined the causal standard in terms of whether age was a motivating factor in the employer's decision. While this court's decision in *McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282 n.10, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1973)* used the term "but for," this court, in *Price Waterhouse*, distinguished *McDonald* by noting that "this passage...does not suggest that the plaintiff must show but cause; it indicates only that if she does

so, she prevails." *Id*. This court also noted that *McDonald* arguably involved only a single motive. In contrast, multiple factors were involved in the plaintiff's termination which prompted the jury to ask:

> Could you please clarify the question: Was plaintiff Dale Gehring's age a determining factor... Is it the only determining factor or one of the determining factor? (App. A44 and A72).

By twice instructing the jury that petitioner had to prove "but for" causation and by further refusing to tell the jury that age did not have to be the sole factor in the decision, the District

Court guaranteed a verdict for J.I. Case. This guarantee was reinforced by the court's additional instruction that the jury was not to second guess J.I. Case's business judgment and that Case was allowed to take its action so long as it had "a legitimate non-discriminatory reason." (App. A71). This instruction told the jury that even if age was a determining factor in petitioner's termination, that the jury must find for J.I. Case if Case produced a legitimate reason for the termination.

The jury's verdict was clearly erroneous since it was evident by the jury's question that they already believed age to be one of the determining factors in the decision and would have returned a verdict for petitioner if they had been properly instructed in the law.

Clearly, there are significant conflicts between the Court of Appeals' decision in this case and decisions of this court. These conflicts involve pivotal issues as to the interplay between Title VII and the ADEA and the proper standard of causation to be applied in employment discrimination cases. This interplay is of particular importance now given the recent extension of Title VII to include a right to trial by jury and the likelihood that district courts will look to jury instructions developed under the ADEA in fashioning jury instructions under Title VII. As this court stated:

> Clarity regarding the requisite element of proof becomes all the more important when a jury must be

instructed concerning them[.]

St. Mary's Honor Center, *113 S.Ct. at 2756*.

Given the importance of the issues involved, Supreme Court review is essential to resolve the conflicts between this court and the Seventh Circuit Court of Appeals and ensure consistency between the substantive provisions of the ADEA and Title VII.

B. Conflicts Among The Circuits Also Require Resolution By This Court.

Although the circuit courts of appeals agree that liability under the ADEA requires proof that age was "a determining factor" in the decision, the circuits vary widely as to what is meant by the words "a determining factor." Like the Seventh Circuit, the First Circuit Court of Appeals in *Loeb v.*

Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979) ruled that "a determining factor" means "but for" causation. In *Loeb*, the First Circuit held that a finding that age was a factor that affected the decision was not equivalent to finding that age was a determinative factor and rejected the district court's use of a "factor that makes a difference" standard. *Id*. See also *Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112 (4th Cir. 1981)* (Determining factor means but for causation); *Kelly v. American Standard, Inc., 640 F.2d 974, 984* (same).

In contrast, the Third Circuit, in *Smithers v. Bailar, 629 F.2d 892, 897 (3rd Cir. 1980)*, held that it was sufficient for the plaintiff to show that age was a factor that made a difference in the decision. The Third Circuit stated that the plaintiff "must establish

that age played a part in the decision, even though the employer could demonstrate strong and perhaps more compelling non-discriminatory reasons for his actions." *Id., at 897.* See also *Laugesen v. Anaconda Co., 510 F.2d 307, 316-317 (6th Cir. 1975)* (Plaintiff may recover if age "made a difference" in the decision); *Kentroti v. Frontier Airlines, 585 F.2d 967, 974 (10th Cir. 1978)* (Same); *Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1224 (11th Cir. 1978)* (Same). Recently, the Eighth Circuit developed yet another standard in *Glover v. McDonnell Douglas Corp., 981 F.2d 388, 393-394 (8th Cir. 1992)* by ruling that a plaintiff must prove that age was a motivating factor in the decision.

While the circuits vary widely as to the appropriate standard of liability

under the ADEA, all circuits which have addressed the issue, with the exception of the Seventh Circuit, have ruled that the jury must be told that age does not have to be the sole factor in the decision. *Laugesen v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975)* ("It was essential for the jury to understand from the instructions that there could be more than one factor in the decision to discharge [the plaintiff] and that he was nevertheless entitled to recover if one such factor was his age and...it made a difference in determining whether he was to be retained or discharged"); *Cancellier v. Federated Department Stores, 672 F.2d 1312, 1316 (9th Cir. 1982)* ("Instructions must protect against mistaken inferences either that age must be the sole factor in the discharge, or that age may be less than a but for cause

of the discharge") and *Haglethorn v. Kennicott Corp., 710 F.2d 76, 86 (2nd Cir. 1983)* (Jury must understand both that there can be more than one determining factor in the employment decision and...that age must be a factor which makes a difference in the decision).

Although the Seventh Circuit in *Golomb v. Prudential Insurance Co., 688 F.2d 547, 522 n.2 (7th Cir. 1982)* stated that district courts should "expressly instruct the jury that age need not be the sole determining factor," the Seventh Circuit, in *Mayall v. Peabody Coal Co., 7 F.3d 570, 574 (7th Cir. 1993) (J. Rovner, dissenting)*, recently ruled that this instruction was not required because the term "a determining factor" had a clear and unambiguous meaning. Subsequently, in petitioner's case, the jury asked the

very question which the Seventh Circuit had claimed was self-evident in *Mayall*, i.e., what is meant by "a determining factor? Is it the only determining factor or one of the determining factors?" Rather than squarely address this contradiction, Justice Easterbrook, who was on the panel that decided *Mayall*, dismissed the jury's question as irrelevant. In direct contradiction to *Mayall*, Justice Easterbrook declared that the term "a determining factor" was "arcane, cabalistic, inscrutable and ambiguous" and should "be red penciled" from ADEA jurisprudence. He then recommended replacing "a determining factor" with the following instruction:

> You must decide
> whether the employer
> would have fired
> [demoted, laid off]

> the employee if the employee had been younger than 40 and everything else had remained the same. (App. A49).

This standard imposes on plaintiffs the impossible task of identifying the precise causal role age played in an employment decision - an approach rejected by this court in *Price Waterhouse*. This instruction also misconstrues the ADEA as prohibiting discrimination because an employee has turned 40 rather than prohibiting discrimination because of an employee's age. The ADEA's 40 and over requirement found in 29 U.S.C. §631 merely defines the persons who can claim protection under the Act. It is not a trip switch that determines when age discrimination,

if it is to occur, will automatically kick in.

Justice Easterbrook's proposed instruction relegislates the ADEA by focusing on the event of turning 40 as opposed to age as a factor in determining the legality of employment decisions. Under the proposed instruction, an employer could reduce a work force in a particular area by stating that all employees over 39 will be terminated and, even if age were the sole criteria, adversely affected employees over 40 would have no recourse under the Act. This formulation leaves common sense at the doorstep and effectively guts the substantive provisions of the ADEA.

The Seventh Circuit's opinion in petitioner's case has opened a Pandora's Box. Rather than clarify the standard of causation for ADEA liability, the Seventh

Circuit's opinion will be certain to create a greater rift among the circuit courts of appeals and generate more confusion for district courts faced with the practical task of instructing juries in both ADEA and Title VII cases. Supreme Court review is essential to resolve the conflicts among the circuits and to halt the Seventh Circuit's attempts to rewrite ADEA jurisprudence by mandating a multiple factor instruction.

C. Supreme Court Review Is Essential To Clarify This Court's Decision In *St. Mary's Honor Center*.

In *St. Marys Honor Center*, this court ruled that the fact finder in a Title VII case could, but was not required to, infer discrimination if it disbelieved the employer's reasons for its actions. In so ruling, the court noted that the respondent had argued that

it was "ill-advised" for the court to come forth with such a holding just as Congress had provided a right to jury trials in Title VII cases. This court disagreed stating:

> We think quite the opposite is true. Clarity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them, and when detailed factual findings by the trial court will not be available upon review.

Id., 113 S.Ct. at 2757.

Based upon this court's ruling in *St. Mary's Honor Center*, the petitioner in this case asked the District Court to instruct the jury as follows:

> If you find that the reasons given by the defendant for selecting plaintiff for termination were not the true reasons, you may infer the defendant intended to discriminate against the plaintiff. However, while a discriminatory motive may be inferred from this fact alone, you are not compelled to draw this inference. (App. A61).

The District Court declined to give this instruction and the Seventh Circuit affirmed stating that a judge need not deliver instructions describing all permissible inferences. This instruction described more than just another permissible inference. It told the jury that it could infer discrimination based solely on disbelief of the employer's reasons - an inference that goes to the very heart of our discrimination laws. This inference is the crux of the *McDonnell Douglas* paradigm which was devised as "a framework that would allow both plaintiffs and the courts to deal effectively with employment discrimination revealed through only circumstantial evidence." *St. Mary's Honor Center, 113 S.Ct. at 2757 citing United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 103*

S.Ct. 1478, 75 L.Ed.2d 403 (1983) ("There will seldom be 'eye witness testimony to the employer's mental processes.'") The purpose of this framework was "to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id. citing Burdine, 101 S.Ct. at 194, n.8.*

Without such an instruction, juries will be left to guess as to the type of evidence required to prove discrimination. While some juries may be omniscient and divine on their own that proof of mendacity on the employer's part is sufficient to establish discrimination, there are other juries who may not be so omniscient. If, as the Seventh Circuit maintains, this inference is irrelevant to a jury's understanding of discrimination law, then one must ask why so much judicial time has been spent

developing and refining the *McDonnell Douglas* paradigm and the inferences that can be drawn from it. If the Seventh Circuit is correct, then the *McDonnell Douglas* paradigm may as well, in the words of Justice Easterbrook, be "red penciled" from our jurisprudence as an "arcane, inscrutable and cabalistic" relic of the past.

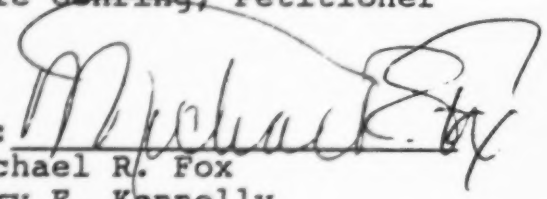
Clearly, Supreme Court review is essential to clarify the importance the *McDonnell Douglas* paradigm plays in the enforcement of our discrimination laws.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted:

Dale ~~Gehring~~, Petitioner

By: 

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APPENDIX OF THE PETITIONER DALE GEHRING

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-1371

Dale Gehring

Plaintiff-Appellant,

v.

Case Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin
No. 93-C-0135-C

Barbara B Crabb, Chief Judge

Argued September 14, 1994
Decided December 28, 1994

Before Lay, *Easterbrook and Ripple, Circuit Judges.

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* Hon. Donald P. Lay, of the Eighth Circuit, sitting by designation.

EASTERBROOK, Circuit Judge. Case Corporation (formerly J.I. Case Corp.) is one of the world's leading producers of construction and agricultural machinery. Selling in a global market, Case has been under intense competitive pressure, and its older facilities have not flourished. The plant in Wausau, Wisconsin had been shrinking steadily when in June 1991 management told Ray Watson, the Controller at Wausau, that he would have to make do with two cost accountants rather than five. Dale Gehring was among the three Watson picked to let go. Gehring had been a supervisor until 1988 when an earlier reduction in force returned him to a line position. Watson believed that Gehring had not adjusted well and was reluctant to do the drudge work of ordinary cost accountancy. Gehring believes that his age (52 at the time) rather than his attitude accounts

for the decision, but the jury believed Watson's explanation and returned a verdict for Case. Gehring asks us to award him another trial. (The Wausau plant closed in October 1993, but Gehring could recover for wages lost between June 1991 and October 1993 if his age led to the earlier discharge.)

The district judge curtailed discovery from Case's personnel files, and Gehring believes that this unduly hampered his case. Gehring was not trying to show that the reduction in force had a disparate impact on Case's older employees-a theory of age discrimination that is unavailable in this circuit, *EEOC v. Francis W. Parker School*, No. 93-3395 (7th Cir. Oct. 21, 1994); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994)-but instead wanted the files to help him establish that Case gave better treatment to younger

employees, buttressing his claim that the reason for his discharge was age. Using this method depends on showing that the other employees selected for comparison are situated similarly to the plaintiff. *Troupe v. May Department Stores Co.*, 20 F.3d 734, 736-38 (7th Cir. 1994). After examining the personnel files Gehring wanted to use, the district judge concluded that the other employees' circumstances were not close enough to Gehring's to make comparisons productive. Turning over the files, however, would invade the privacy of the other employees and the district judge feared that Gehring wanted to use this evidence not for purpose of comparison but to put Case's personnel practices on trial. The judge concluded that the privacy interests, coupled with her determination to keep the trial focused squarely on Gehring's claim, justified limiting

counsel's ability to root through the personnel files. The judge followed up with similar evidentiary rulings at trial. District judges have substantial discretion to make such decisions to curtail the expense and intrusiveness of discovery and trial. *Rennie v. Dalton*, 3 F.3d 1100, 1110 (7th Cir. 1993). The judge, who permitted live testimony (in Gehring's favor) from one of the proposed comparison employees, did not abuse that discretion.

Gehring's other arguments concern the jury instructions. He wanted the judge to walk the jury through the paradigm established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The judge declined, for the very good reason that the Supreme Court has held that this burden-shifting model applies to pretrial proceedings, not to the jury's evaluation of evidence at trial. Once the judge

finds that the plaintiff has made the minimum necessary demonstration (the "prima facie case") and that the defendant has produced an age-neutral explanation, the burden-shifting apparatus has served its purpose and the only remaining question-the *only* question the jury need answer-is whether the plaintiff is a victim of intentional discrimination. *Postal Service v. Aikens*, 460 U.S. 711, 715 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). See also *EEOC v. G-K-G, Inc.*, No. 93-2275 (7th Cir. Nov. 4, 1994), slip op. 9; *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992); *Ramsey v. American Air Filter Co.*, 772 F.2d 1303, 1312-13 (7th Cir. 1985). Gehring also wanted the judge to instruct the jury about one permissible inference: that if it did not believe the employer's

explanation for its decisions, it may infer that the employer is trying to cover up age discrimination. This is a correct statement of the law, *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2749 (1993), but a judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory, inference. Many an inference is permissible. Rather than describing each, the judge may and usually should leave the subject to the argument of counsel. *United States v. Sblendorio*, 830 F.2d 1382, 1391 (7th Cir. 1987). Gehring's lawyer asked the jury to draw this inference; neither judge nor defense counsel so much as hinted that any legal obstacle stood in the way. Instructions on the topic were unnecessary.

One of Gehring's arguments gives us pause, however. Not only the lawyers but also the judge repeatedly used the words "determining factor." The special verdict forms called on the jury to decide whether Gehring's age was "a determining factor in the defendant's decision to terminate his employment?" The instruction defining this term reads:

> You are instructed that in answering Question No. 1 on the special verdict form, you must decide whether plaintiff has shown by the greater weight of the credible evidence that he would not have been let go had it not been for his age. If your answer to this question is yes, then you have found that plaintiff's age was a determining factor in the termination of his employment and you should answer "yes" to Question No. 1 on the

verdict. If you decide that the plaintiff has not shown by the greater weight of the credible evidence that he would have been let go had it not been for his age, then you have found that age was not a determining factor in the termination of his employment and you should answer "no" to Question No. 1 on the verdict.

After deliberating for a while, the jury asked the judge to clarify what it means for age to be "a determining factor...Is it the only determining factor or one of the determining factor?" [Sic.] Gehring asked the judge to reply that there may be more than one "determining factor" and that it should decide in his favor if age was among them. Instead the judge told the jury:

The question asks about a determining factor. By a determining

factor, I mean the plaintiff must prove that he would not have been selected for layoff but for his age.

Gehring insists that both the original instruction and the response to the jury's question are error.

How "determining factor" entered the vocabulary of age discrimination is a mystery. The term does not appear in the Age Discrimination in Employment Act, and the Supreme Court has never used it in a case under the ADEA. True, the Court once quoted from a legislative report that contains the term, see *Western Air Lines, Inc. v. Criswell,* 472 U.S. 400, 411 n.16 (1985), but it did not suggest that these words have any legal significance. Terms that lack legal meaning may be useful in jury instructions if they assist lay deciders in coping with the words that do carry legal force. But "determining factor" is not a term in common usage and

it therefore does not illuminate the essential concepts. Putting unusual terms in jury instructions does little beyond confusing the jurors. Jurors must learn concepts with which they are apt to be unfamiliar. Expressing these concepts in terms with which they are unfamiliar can't help matters. Good instructions use simple words in short, concrete sentences. E.g., Federal Judicial Center, *Pattern Criminal Jury Instructions* (1987) (including an appendix of suggestions for making instructions more understandable). Judges ought not assume that jurors come armed with copies of H.L.A. Hart & Tony Honore, *Causation in the Law* (2d ed. 1985), and the academic background necessary to put its distinctions to use.

The legal question is straightforward and may be explained without reference to words such as "determining factor." Hart & Honore found

it possible to plumb the depths of causation without employing these words; juries, too, can dispense with them. They must decide whether age accounts for the decision-in other words, whether the same events would have transpired if the employee had been younger than 40 and everything else had been the same. *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1706 (1993); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655 (7th Cir. 1991) (en banc). Because the ADEA's question is counterfactual (the jury must ask what would have happened if conditions were different), it is especially important to write instructions that are as clear and simple as possible. When the legal issue is complex, simplicity of language is vital. "Determining factor" has no useful role to play in jury instructions under the ADEA. These words pose but do not answer

the very question this jury asked: what happens if more than one factor is at work?

To say that jury instructions ought to avoid legalistic and ambiguous terms is not to say that an instruction including them is reversible error. *Mayall v. Peabody Coal Co.*, 7 F.3d 570, 573-74 (7th Cir. 1993), holds that an instruction using this term does not compel reversal, even if the judge declines to add that there may be more than one determining factor. Gehring contends that the events of his trial show the problem with this term and should lead us to overrule *Mayall*, but the principle of that case-that a party is not entitled to the best possible instruction-is sound and dispositive. For the instructions given to this jury told the jury what it needed to know. Recall the first sentence of the instruction:

"You are instructed that in answering Question No. 1 on the special verdict form, you must decide whether plaintiff has shown by the greater weight of the credible evidence that he would not have been let go had it not been for his age." This is the fundamental question under the ADEA and the judge repeated this advice when the jury asked about "determining factor." In these instructions "determining factor" carried no weight. The words could have been replaced by "banana" wherever they appeared, without loss of meaning.

What the jury needs to know can, and should, be expressed in simple language. Here is one attractive formulation: "You must decide whether the employer would have fired [demoted, laid off] the employee if the employee had been younger than 40 and everything else had remained the same." Such an instruction uses

simple and familiar words, avoids double negatives, and can be tailored to the circumstances of the claim. It tells the jury what to do if it finds that the employer took more than one thing into account. Suppose the employer considered four things in sacking an employee: age, skills, attendance and attitude. If any two of these (mediocre skills and bad attitude, for example), would have been enough to produce a discharge, then there has been no age discrimination, and a jury asking the question as we have phrased it would give the right answer. If, however, all four in conjunction brought about the discharge-if the employee would have been retained had he been younger, or more punctual, or more skilled, or more enthusiastic-then age tipped the balance, and the employee should prevail, and would do so under the instruction we suggest. Similarly, if the

employer would not have discharged the employee without the presence of three factors, and the jury disbelieves the employer's position on one of them (concludes, say, that the employee's attitude was fine), then under this formulation the jury will return a verdict for the plaintiff.

Other cases suggest variations, which although a little more complex provide the same information. See *Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 393-94 (8th Cir. 1992) (suggesting that the judge tell the jury to decide for the defendant if the same decision would have been made regardless of the plaintiff's age). We do not want to tie the judge's hands; language works best if it responds to the nature of the precise dispute between the parties. But we urge every district judge to take a red pencil to arcane, cabalistic, inscrutable,

ambiguous and unnecessary words. The closer the instructions come to the jurors' everyday language, the more likely the jurors are to apply them correctly.

AFFIRMED

A true Copy:
Teste:

/s/_____
Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 30, 1995

Before

Hon. Donald P. Lay, Circuit Judge*

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Kenneth F. Ripple, Circuit Judge

DALE GEHRING,
Plaintiff-Appellant,

No. 94-1317

CASE CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin
No. 93-C-0135-C
Barbara B. Crabb, Chief Judge.

Order

Plaintiff-appellant filed a petition for rehearing and suggestion of rehearing en banc on January 19, 1995. No judge in regular active service has requested a vote on the suggestion of rehearing en banc. and all of the judges on the panel have voted to deny rehearing. The

petition for rehearing is therefore DENIED.

---

*Hon. Donald P. Lay of the Eighth Circuit is sitting by designation.

UNITED STATES DISTRICT COURT
Western District of Wisconsin

DALE GEHRING, JUDGMENT IN A CIVIL CASE

Plaintiff, Case No. 93-C-0135-C

vs.,

J.I. CASE,

Defendant.

This action came before the court and a jury with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

---

that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant J.I. Case recover of the plaintiff, Dale Gehring, its costs of action.

Approved as to form this 28th day of January, 1994.

/s/_____
Barbara B. Crabb
U.S. District Judge

This document has been provided to Fox & Shindell this 31st day of January, 1994
By /s/_____
S. Hahn
Deputy Clerk

_____
Joseph W. Skupniewitz, Clerk

/s/_____ Jan 31 1994
Warren Nelson
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DALE GEHRING,

Plaintiff,

v.

J.I. CASE,

Defendant.

ORDER

93-C-135-C

- -

Plaintiff has moved for a new trial on a number of grounds. All of the grounds that he raises were dealt with either before trial or during the course of trial. I do not see that any purpose would be served in discussing these further.

IT IS ORDERED that plaintiff's motion for a new trial is DENIED.

Entered this 7th day of February, 1994.

BY THE COURT:

/s/_____
Barbara B. Crabb
District Judge

A copy of this document has been mailed to the following: Atty Fox & Shindell this 8th day of February, 1994 by J.M. Dye, Secretary to Judge Crabb

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

DALE GEHRING,

Plaintiff,

vs. Civil Case 93-C-0135-C

J.I. CASE, Madison, Wisconsin
January 26, 1994
Defendant. 9:02 a.m.
VOLUME 3-A

STENOGRAPHIC TRANSCRIPT OF THIRD DAY OF TRIAL HELD BEFORE THE HONORABLE BARBARA B. CRABB, and a Jury. (Morning Session Only.)

APPEARANCES:

For the Plaintiff:
Fox & Fox
BY: MICHAEL R. FOX
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For the Defendant:
Shindell & Shindell
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ANNE B. SHINDELL
411 E. Wisconsin Ave
Milwaukee, WI 53202

Also Present:

Dale Gehring, Plaintiff

Dennis R. Winkleman, J.I. Case Company

KATHLEEN BANKS
Official Court Reporter
United States District Court
120 N. Henry St., Rm. 120
Madison, WI 53703
1-608-255-3821

MS. KENNELLY: I do have one that I would like to propose that's based on the Hicks decision. It's taken almost verbatim from the Opinion on Page 8.

If you find that the reasons given by the defendant for selecting plaintiff for termination were not the true reasons, you may infer the defendants intended to discriminate against the plaintiff. However, while a discriminatory motive may be inferred from this fact alone, you are not compelled to draw this inference.

And that tracks the language right here in the Decision almost verbatim.

THE COURT: Okay.

MS. KENNELLY: Should I read a little slower or --

MS. SHINDELL: I believe the instruction we have there says that if you find -- or, well, it goes or it's

incorporated into our burden of proof. But there's a second one, and that begins-

MR. SHINDELL: It is right here. It's right here. It begins here.

If you find that plaintiff has proven these facts, and it's referring back to earlier, and it is on Page 32 of our submitted instructions, and that the defendant has not produced a reason other than age for the elimination of plaintiff's position, then you must find for plaintiff.

If on the other hand, defendant has produced evidence of a

THE COURT: All right. If you decide that plaintiff has not shown blah, blah, blah.

MR. SHINDELL: Right.

MS. SHINDELL: That age was the determining factor.

THE COURT: All right, you can figure that out. This is Karen Guss, by the way, my law clerk.

MS. GUSS: Yes.

THE COURT: That's all I was going to do, except for what they have to know about punitive.

MS. KENNELLY: I have one request.

MS. SHINDELL: I have one proposal. I am sorry, I didn't mean -- go ahead.

MS. KENNELLY: This we would like to submit. Actually it's Defendant's Proposed Instruction Number 19, which is very similar to one we had incorporated into the instruction we use, which is -

the line in particular we're interested in is the second line. It's Page 30.

The plaintiff need not prove that age was the only factor motivating the defendant's decision, but he must prove that age was a "determining factor" in the elimination of his position and his severance.

MS. SHINDELL: And it should be "the determining factor."

MR. SHINDELL: Well, our instruction-

THE COURT: Which number is that?

MS. SHINDELL: It is Page 30.

MS. KENNELLY: Page 30, Instruction Number 19.

MR. SHINDELL: We would agree to that, Your Honor, only if the Court gave the corollary instructions. Because the one they have isolated only makes sense in the context of the ones before and after, which I'm sure the Court doesn't want to do.

MS. KENNELLY: The whole instruction, that's fine.

MS. SHINDELL: No. The one that you have isolated is part of a set. And if you pull it out, it's not -- it doesn't make sense.

THE COURT: I don't think that we need that. I think that's what this is intended to do.

MR. FOX: Can we integrate a sentence into that about the multiple, or because

we are always concerned about the multiple factor situation, and some reference to that? And I don't know whether or not -

MR. SHINDELL: Well, maybe we can resolve it, because Case is not going to argue that it is not a factor, but it is not the determining factor. We're not going to get into this big motive thing, which should be apparent from our case, so -

MS. KENNELLY: I already think there is a mixed motive issue, because we have admitted that the reduction in force was a factor in the determination.

MR. SHINDELL: Yeah, but -

MS. KENNELLY: It is possible under the instructions

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

DALE GEHRING,

Plaintiff,

vs.

J.I. CASE,

Defendant.

VOLUME 3-B

Case No. 93-C-135-C

Madison, Wisconsin
January 26, 1994
2:15 p.m.

TRANSCRIPT OF THIRD DAY OF TRIAL,

Afternoon Session HELD BEFORE THE

HONORABLE BARBARA B. CRABB, and a Jury.

APPEARANCES:

For the Plaintiff:

Fox & Fox, S.C.
BY: MICHAEL FOX, and
BY: MARY KENNELLY
44 E. Mifflin Street
Suite 403
Madison, WI 53703

For the Defendant:

Shindell & Shindell
BY:LAWRENCE SHINDELL
BY:ANNE B. SHINDELL
411 E. Wisconsin Ave
Milwaukee, WI 53202

Also Present: Dale Gehring,
plaintiff

Dennis R. Winkleman
Representative for
J.I. Case

NANCY SCHELL
Official Court Reporter
United States District Court
120 North Henry Street
Madison, Wisconsin 53703
1-608-255-3821

the jury.)

(At 5:30 p.m. proceedings reconvened outside the presence of the jury.)

THE COURT: They certainly went right to the heart of it, didn't they? For the record, I will read the question from the jury and note that there are appearances for the plaintiff and the plaintiff is present in person and the defendants are here by counsel.

The note is: "The Honorable Barbara B. Crabb: Could you please clarify the question was plaintiff Dale Gehring's age an underlying determining factor? Is the only determining factor or one of the determining factors?" It is signed by Mr. Ausse.

Any suggestions as to whether the question should be answered and, if so, how?

MR. FOX: The plaintiff would like it answered that it is one of the determining -- we could reinstitute the requested instruction, but there may be more than one determining factor. It simply has to be one of the determining factors in the decision.

MR. SHINDELL: This goes precisely to what we raised before, and I think the only legally correct answer can be that it must be the determining factor and it should be answered in that way.

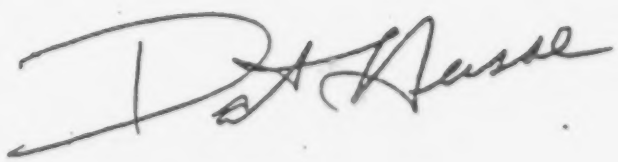
We would also ask that the special verdict be modified to

In determining whether plaintiff has proven that defendant intended to discriminate against plaintiff because of his age, I instruct you that the question is not whether defendant exercised good business judgment in eliminating plaintiff's position, or whether you agree or disagree with defendant's reason. Defendant was allowed to take its action so long as defendant had a legitimate, non-discriminatory reason.

To the Honorable Barbara B Crabb

Could you please clarify the question: was plaintiff Dale Geinrig's age a determining factor...

Is it the only determining factor or one of the determining factor?



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Supreme Court, U.S.
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(2)

No. 94-1780

In The

Supreme Court of the United States

October Term, 1994

DALE GEHRING,

Petitioner,

v.

J. I. CASE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner's principal issue is founded on a contention that this is a "mixed motives" case governed by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Petitioner did not present his case as a mixed motives case before the district court or the Court of Appeals but presented it as a pretext case. It is not a mixed motives case. Petitioner misreads *Price Waterhouse* and improperly attempts to transform his case into a mixed motives case to secure review.

Petitioner's second issue concerning *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993), though accurately stated, does not independently warrant review.

Respondent, Case Corporation, believes the questions presented are:

1. Has Petitioner waived the central basis for review?

2. In a pretext-based age discrimination case, where the jury is instructed that age must be "a determining" factor to an adverse employment decision, **must** the jury **also** be instructed that age need not have been "the sole" factor in order to find age discrimination?

3. **Must** the jury in a pretext-based age discrimination case be instructed under *St. Mary's Honor Center v. Hicks* that it can presumptively find discrimination if it finds the employer's stated reasons for its action are pretextual?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below are petitioner Dale P. Gehring, who is an adult resident of the State of Wisconsin, and respondent, J. I. Case, which is now known as Case Corporation.

Case Corporation is a publicly owned Delaware corporation, with no parent entity and with the following non-wholly owned, non-foreign subsidiaries or partnerships/joint ventures:

Megavolt L.P., a Delaware Limited Partnership
Consolidated Diesel Company, a North Carolina General Partnership
Hay & Forage Industries, a Kansas General Partnership
Case Equipment Loan Trust 1992-A, a Delaware Partnership
Case Equipment Loan Trust 1993-A, a Delaware Partnership
Case Equipment Loan Trust 1993-B, a Delaware Partnership
Case Equipment Loan Trust 1994-A, a Delaware Partnership.

The following publicly owned corporate stockholder owns more than 10 percent of the stock of Case Corporation:

Tenneco, Inc., a Delaware corporation (and its wholly owned subsidiaries).

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28 U.S.C. § 1254(1) 1

Case submits that the Petition for Writ of Certiorari should be denied as review by the Court is neither warranted nor required under its criteria for granting review.

OPINIONS BELOW

The Court of Appeals affirmed the district court's denial of Gehring's requests for two jury instructions – one supplanting the but-for causation instruction with a statement that age need not be the sole factor (the district court and Case never suggested that age must be the sole factor), and the other an inference instruction based on *St. Mary's Honor Center v. Hicks* – and affirmed the district court's reiteration when the jury returned with a question concerning "a determining factor" that the phrase means but-for Gehring's age, he would not have been discharged.

The Court of Appeals denied Gehring's requests for rehearing and rehearing *en banc*.

The Court of Appeals' opinion is reported at 43 F.3d 340 and is accurately reproduced (minor typographical errors excepted) in Gehring's Petition at A36-A52.

The district court's unpublished judgment and order denying Gehring's motion for a new trial are accurately reproduced in Gehring's Petition at A55-A58.

JURISDICTIONAL STATEMENT

The Court of Appeals' order denying rehearing and rehearing *en banc* was entered January 30, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Because of the underlying issues of waiver and whether this is a mixed motives case, a detailed statement of the facts and Gehring's claims presented below is necessary.

Gehring's Discharge and The Facts Below

Case is a world-wide construction and agriculture equipment manufacturer headquartered in Racine, Wisconsin, with a facility formerly located in Wausau, Wisconsin. Gehring was employed with Case at this facility from 1964 to June 1991, when his employment ended during a reduction in force (RIF).

The 1991 RIF was not an isolated RIF for Case. Case had undergone several RIF's world-wide since 1990, reducing its work force by nearly half (to 17,000 employees) in order to remain viable in the increasingly competitive world-wide construction and agriculture equipment manufacturing industry. As a result, in 1993 Case was profitable after posting a loss of over 1 billion dollars in 1991.

Gehring joined Case in 1964 as a cost clerk, with a high school education and a one-year business accounting technical degree. Gehring subsequently graduated through a number of positions – from cost clerk, to cost accountant "Sr.," to cost supervisor and, in 1988, back to cost accountant, the position he held until his employment ended in 1991.[1]

---

[1] Gehring lost his supervisory position in 1988 during a RIF that year, which was one of five RIF's occurring at the Wausau facility between 1988 and 1992.

At Case, Gehring undertook no formal education. The informal training he undertook consisted mostly of in-house seminars; most occurred in the 1970's to mid-1980's and none occurred after 1989.

The trial record established that Gehring wanted to remain a supervisor, and at issue was Gehring's unwillingness or lack of interest in doing the day-to-day monotonous detailed work needed to be done in the accounting department – a factor which became decisive when the 1991 plant-wide RIF occurred.

Ray Watson, Case's Wausau Controller, was the preliminary decision-maker for the finance department reductions during the 1991 RIF. Gehring's supervisor before Watson, Jim Von Rueden (whom Gehring had once supervised but who later surpassed Gehring and became Gehring's supervisor) had noted Gehring's disinclination to do detailed or day-to-day work (versus supervisory work) both when Gehring was a cost supervisor under his management and after 1988, when Gehring returned to his former cost accountant position.

Watson was recruited from another corporation in 1989, where he was Controller, because he had an auditing background. In April 1989, Case's Wausau facility had received a substantially negative audit report from its then parent entity, Tenneco, Inc. Within six months of Watson's arrival, the Wausau facility received a vastly improved rating in an initial follow-up audit.

Watson raised the performance "chin bar" within the finance department. As a result, he was not liked by some of his staff; and to a degree this included Gehring. Gehring and one particular co-worker (on whom Gehring

relied at trial for the putative direct evidence of discrimination referenced in Gehring's Petition) were allies within the department.

As part of raising the chin bar, Watson reorganized the functions of the cost accountants in the finance department (there were three), one of whom was Gehring. Instead of each being a generalist on several accounting aspects of the three main Case Wausau product lines, each was given a specific function common to each product. Gehring was to focus on special feature requests for the three products and on special projects, a decision Watson made with input of Gehring's former supervisor, Von Rueden.[2]

In early 1990, some of the special feature work was performed manually; the remainder was computerized. By early 1991, all of this work was computerized; equally significant, special feature work as a whole had substantially declined, as Case's production as a whole had declined.

As stated, the pivotal issue at trial was Gehring's inability or unwillingness to do day-to-day detailed work of the accounting department. In April 1991, Gehring identified his major objectives for that year; four of the six were to coordinate or assist in (not do) the finance department work.

Two independent witnesses, Von Rueden and Will Wellman (the oldest member of the finance area **and**

---

[2] Special feature work consisted of reviewing the pricing of non-standard product components and totalling the material and labor values factored into the pricing.

retained during the 1991 RIF), corroborated Gehring's proclivity:

> Von Rueden:
>
> Basically, Dale's strength has always been his supervisory skills. . . . [But as] far as the day-to-day type of activities, he's probably not as proficient as other people that we've had in that position. . . .
>
> [The] detail, that was . . . something that he generally was able to have the people that he worked with to help him out with. . . .

Case App. 9.

> Wellman:
>
> [From] my observations [over the years]. . . . I believe that Dale was more interested in having meetings and discussing things than the on-hand gritty work.

Case App. 9-10.

When plans for the 1991 RIF were announced, Wausau plant manager Gallagher first asked Watson to give up two positions from the finance department. Watson's choices did not include Gehring's position. They included a clerical position held by a 48-year-old employee, and an administrative position held by a 35-year-old employee.[3]

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[3] Watson identified the clerical position (accounts payable clerk) because the individual occupying it, though doing a good job in the position, told Watson before the RIF in unrelated conversations that he did not want to do anything else. Watson identified the administrative position (general accounting administrator) because the person occupying it had been hired

After reporting to the plant manager with his recommendations, Watson was then asked to identify a third finance department position for elimination. Upset over having to give up a third, Watson identified Gehring's position, one of three cost accounting positions.

Watson testified that he identified Gehring's position as the third (rather than one of the other two cost accounting positions), because of Gehring's disinclination to do the detailed work of cost accountancy:

> We come back that the focus or the task was how to get the job done and continue the contribution with less people. We had daily routine tasks, we had special projects.

Case App. 11.

Gehring had the "technical competence" to perform the work of the other cost accountant positions, but nonetheless:

> . . . there was a reluctance on Dale's part to do the daily routine boring work, as some people may refer to it.
>
> So although he provided a valuable service as a special project guy, could we get by without it? Would it hurt us less without the special projects as the day-to-day? It would hurt us less.

Case App. 11-12.

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to replace Wellman when Wellman chose to retire (Wellman had already advised the company of his personal plans to retire in 1993). Watson focused on how he was going to get the same job done with two less people.

Gehring asserted that he was more versatile than the two other costs accountants who were retained, and that he should have been compared to these other accountants (reiterated in Petition at 3). The issue was not Gehring's versatility but **the department's** functionality if different positions were lost instead of Gehring's.

Gehring's chief witness at trial corroborated Case's position, admitting that he asked Watson hours after learning of the RIF why Gehring's position had been chosen, and that Watson said Gehring "was an Accountant II . . . [something about his] [in]ability to do some detailed thing[s] . . . [and] that the necessity for his function had been diminished [due to the computerization of special features work.]" Case App. 12-14.[4]

Gehring did not introduce direct evidence of discrimination. He relied on a single, alleged, temporally unconnected statement by Watson that Gehring had "retired before his time," introduced through Gehring's co-worker and chief witness, who was shown to be biased. The district court noted at close of evidence motions that "there [isn't] a perfect correlation between saying someone retired before his time and age discrimination." Case

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[4] Two Accountant III's were retained, which were of a higher classification than the Accountant II position Gehring held.

Cross-classification seniority comparisons (e.g., comparing an Accountant II to an Accountant III) were not permitted under Case's lay-off selection guidelines. Final decision-maker Winkleman, Case's Corporate Human Resources Manager, approved the recommendation concerning Gehring's position without a cross-classification comparison for this reason and under the guidelines designed to assure objectivity.

App. 14. Another co-worker (and Gehring witness) bolstered Watson's credibility, stating that Watson was honest and fair and that he had no problems with Watson: "[You] grew to learn his needs and wants. And once you did that, [I] was comfortable . . . with him." Case App. 15.

Watson did not recall ever saying that Gehring had "retired before his time," though he acknowledged that he had made the statement generally at Case Wausau in raising performance standards to reverse the substantially negative audit. At trial, he candidly said he believed Gehring had "retired before his time," in the sense that Gehring had chosen not to continue to improve his technical skills or his contribution to the department, despite reviews that his skills were lacking, instead choosing to gravitate toward special projects and assisting others – a role akin to his former role as a supervisor.

By contrast, Watson viewed Wellman, the oldest member of the department (age 53 in 1991) **and** retained during the RIF, as having accepted the challenge to "raise the chin bar" (versus Gehring's resisting it).[5] Eldon Horton, age 46 in 1991, whose position Watson also retained,

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[5] As part of raising the chin bar, Watson accelerated month-end closing reports – from the fifth day of the month following closing to 9:00 a.m. of the second business day of the month. Wellman brought Wausau forward to a number two ranking Case-wide in its month-end closing.

Timely month-end closing required timely receipt of journal entries from the cost group, which Gehring *de facto* headed based on his years of service with Case. Wellman managed the accelerated month-end closing project as the formal head of general accounting. Out of apparent resentment over losing his supervisor position in 1988, Gehring resisted the accelerated time-table by having his group delay submitting its journal

chose to learn extensive PC technology and to apply it to Case Wausau. The record also established that five of the six other finance department employees retained during the 1991 RIF were in the protected class.

The Instructions Below

Detailed discussion of the instructions Gehring requested at trial appears in the relevant discussion sections of this brief. Gehring did not present mixed motives evidence as defined by *Price Waterhouse* but presented a standard pretext case and requested a standard pretext instruction. Case App. 1.

DISCUSSION

Gehring confuses this case by equating *Price Waterhouse's* adoption of a shifting burden in confined "mixed motives" cases with the Court's definition of the "but-for" causation standard applicable to all disparate treatment cases.[6] He presumes but never establishes that this is a "mixed motives" case within the meaning of *Price Waterhouse*.

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entries until precisely 9:00 a.m. of the second business day of each month-end cycle, even when the information was ready for transmittal earlier.

[6] *See* Petition at i ("The question presented is whether the standard of causation for a multiple motive case brought under the [ADEA] . . . require[s] a multiple motive instruction. . . . "); and at 3 ("Given that petitioner's discharge involved multiple motives, petitioner asked the District Court to instruct the jury that age did not have to be the sole factor in the discharge decision. . . . ").

Price Waterhouse did not change the causation requirement in disparate treatment cases. There is nothing aberrant about the Court of Appeals' opinion in this case, and review is not necessary despite Gehring's conflating *Price Waterhouse*.

We begin with the point that Gehring never raised below the *Price Waterhouse* issue he now raises in his petition, a threshold basis on which certiorari can and should be denied.

We follow with discussion that this is not a mixed motives case within the meaning of *Price Waterhouse*, and that the Court of Appeals' decision nevertheless comports with the causation standard in disparate treatment cases affirmed in *Price Waterhouse* and this Court's subsequent precedent.

I. PETITIONER NEVER RAISED HIS CENTRAL ISSUE REGARDING *PRICE WATERHOUSE v. HOPKINS* BEFORE THE DISTRICT COURT OR THE COURT OF APPEALS

Below, Gehring contended only that the district court erred in not supplanting the but-for instruction with the statement that age need not be the sole factor to an adverse employment decision. Case App. 2 (Gehring Court of Appeals brief at 12 & 13). The district court and Court of Appeals each concluded that the but-for causation standard for disparate treatment ADEA cases self-evidently implies that age need not be the sole factor, and that an additional supplanting statement is unnecessary.

That Gehring pressed his case as a pretext case is shown by the substantive instruction he actually sought at trial. Case App. 1. He requested a standard pretext instruction, not a *Price Waterhouse* burden-shifting, mixed motives instruction. It is also shown by his requested *St. Mary's Honor Center v. Hicks* instruction, Case App. 8, a **pretext** instruction, by which Gehring wished overtly to tell the jury that it could infer discrimination merely from its disbelief of (if it disbelieved) Case's explanation for eliminating Gehring's position. *See also* Petition at 30 ("This inference is the crux of [a ***McDonnell Douglas*** case].") (emphasis supplied).

Gehring twice cited *Price Waterhouse* to the Court of Appeals but only cryptically and for reasons unrelated to a claim that his was a mixed motives case.[7] Gehring also asserted that his case involved "two determining factors" because of **the RIF** and age ("but for the reduction in

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[7] *See* Case App. 3-6 (Gehring Court of Appeals brief at 18; abstractly referencing *Price Waterhouse* and asserting that "the phrase 'a determining factor' has anything but a clear meaning"; Reply at 8, citing *Price Waterhouse* for the tangential proposition that age need not have been the sole cause for Gehring to prevail; Case's brief at 37-38, n. 19, stating that the citation to *Price Waterhouse* is unclear and in any case inapposite [and noting that Gehring's citation to the Civil Rights Act of 1991 was inapt, since his claim arose before the Act's effective date and since the relevant portions of the ADEA were not altered by the Act; *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483 (1994) (non-retroactivity generally); *Armbruster v. Unisys Corp.*, 32 F.3d 768, 771 at n. 3 (3rd Cir. 1994) (as to ADEA cases); *Miller v. Cigna Corp.*, 47 F.3d 586, 598-99 at n. 10 (3rd Cir. 1995) (*en banc*) (substantive provisions of the Act did not amend the ADEA)]).

force [Gehring's] age wouldn't have made any difference."), *see* Case App. 15; but as discussed below, this is not what a *Price Waterhouse* "mixed motives" case is about.

For the reasons evident from the subsequent discussion of this brief, the Court of Appeals did not discuss *Price Waterhouse* in its opinion or treat the case as a *Price Waterhouse* mixed motives case.

Review by this Court is unmerited under its rules of waiver. Absent extraordinary circumstances – not present here – issues not raised before the district court or the Court of Appeals will not be considered as a basis for granting certiorari. *Illinois v. Gates*, 462 U.S. 218, 219-22 (1983) (new issue versus new argument on previously raised issue will not be considered); *see also Lebron v. National R.R. Passenger Corp.*, ___ U.S. ___, 115 S. Ct. 961, 965 (1995) (waiver rule; but considering new argument to support claim actually raised below).

II. THIS IS NOT A "MIXED MOTIVES" CASE

Price Waterhouse established a burden shifting mechanism for a limited number of cases where overt evidence of discriminatory animus exists. *Price Waterhouse*, 490 U.S. at 261 (O'Connor, J., concurring). The Court in *Price Waterhouse* did not alter the but-for causation standard[8]

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[8] *See Price Waterhouse*, 490 U.S. at 246, n. 11 ("[W]here an employer is unable to prove its claim that it would have made the same decision in the absence of discrimination, we are entitled to conclude that gender *did* make a difference to the outcome.") (plurality opinion) (emphasis original); *Id.* at 249 ("A court that finds for a plaintiff under this standard has effectively

but held that where the plaintiff presents sufficient evidence of discriminatory animus, the burden of persuasion shifts to the employer to show that it would have made the same decision absent the unlawful motive. 490 U.S. at 258 (plurality opinion); *Id.* at 260 (White, J., concurring); *Id.* at 261 (O'Connor, J., concurring); *Id.* at 291 ("risk of non-persuasion" [**disproving** but-for causation] shifts to the employer) (Kennedy, J., dissenting, with Renquist, C.J., and Scalia, J., joining).

Price Waterhouse cases unaffected by the Civil Rights Act of 1991 require "overt or [e]xplicit evidence of discrimination – *i.e.*, the 'smoking gun' . . . ," *Armbruster v. Unisys Corp.*, 32 F.3d 768, 782 (3rd Cir. 1994) (*quoting Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 523 (3rd Cir. 1992)). The evidence must be "so revealing of discriminatory animus that it is not necessary to rely on any presumption from the *prima facie* case to shift the burden of production." *Armbruster*, 32 F.3d at 778. The evidence must be direct and substantial enough to warrant shifting the burden to the employer to disprove that the illegitimate factor was not a but-for cause of the decision, i.e., that it would have made the same decision absent considering the illegitimate factor. *Id.*

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concluded that an illegitimate motive was a 'but-for' cause of the employment decision.") (plurality opinion) (citations omitted); *Id.* at 281 ("The theory of Title VII liability the plurality adopts . . . essentially incorporates the but-for standard.") (Kennedy, J., dissenting); *Id.* at 281 ("The importance of today's decision is not the standard of causation it employs, but its shift to the defendant of the burden of proof.") (Kennedy, J., dissenting).

"Stray remarks" by non-decisionmakers, or "statements by decisionmakers unrelated to the decisional process itself," will not suffice. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring). In only a very limited number of cases is *Price Waterhouse* relevant. *Id.* at 280 ("In sum, the Court alters the evidentiary framework of *McDonnell Douglas* and *Burdine* for a closely defined set of cases.") (Kennedy, J., dissenting).

The motive, in addition to age, which Gehring ascribed at trial was the RIF:

> There can be two determining factors. . . . For instance, in this case to use a real good example, but for the reduction in force his age wouldn't have made any difference. It had to be a combination of two determining factors. One, a reduction in force. The decision would not have happened without that. One, the fact that he was old and both are -- they are necessary for the equation. Both have to be there in order for there to be discrimination or he wouldn't have been terminated.

Case App. 15.

The district court correctly observed (the Court of Appeals implicitly agreed):

> We assume the reduction in force. All we . . . are trying to isolate out of this picture is assuming a reduction in force and a necessity to fire three people, what was it that made this person one of [the] three? So sure, of course, without a reduction in force none of us would be here in this courtroom arguing this case. So that isn't -- the determining factor in why Dale Gehring was

> picked as one of the three is in your view his age and in defendant's view something else.

Case App. 16.[9]

The coalescence of the RIF and Gehring's discharge did not create a *Price Waterhouse* mixed motives case. *See Starceski v. Westinghouse Electric Corp.*, ___ F.3d ___, 1995 WL 254804, at *4 (3rd Cir. May 3, 1995) (affirming the use of a *Price Waterhouse* mixed motives instruction in a RIF case, but basing its decision on plaintiff's supervisor's testimony that the second level manager responsible for the termination decision and for implementing the RIF

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[9] Gehring identified the RIF as a "multiple motive" in arguing to the district court that the jury should be told that age need not be the sole cause of his discharge – an argument principally made after the jury returned with a question about the meaning of the but-for causation phrase of age must be "a determining factor." This was an extension of his argument made during pretrial conference over whether the district court should use the phrase "**a** determining factor" in the special verdict and instructions (the formulation Gehring requested) or "**the** determining factor" (the formulation Case requested, since it is logically confusing to have more than one **determining** – or but-for – cause) – revisited at the instruction conference. The district court used Gehring's "**a** determining factor" formulation.

Gehring had briefly identified the RIF as the "mixed motive" during the instruction conference. (See Petition at A66.) In response to the district court's observation quoted in text (the proceedings following the jury's question), Gehring then suggested that his type of job was a mixed motive: "Age has to be a factor that tips the scale. It has to be a but for factor. [But] [e]ven taking this reduction in force, they could say, Well, [sic] it was age plus the type of job he had. . . . If he was a younger man . . . in that particular job, he wouldn't have been the one selected. . . . " Case App. 16. None of this creates a true mixed motives case.

told the supervisor and other second level supervisors "to consider age in the assignment of work" and "to transfer work from older to younger employees," and told him in relation to the plaintiff "to 'doctor' [plaintiff's] performance appraisals so that they would reflect poor performance"). *Starceski* rejected a general rule that all successfully prosecuted age discrimination cases involving a RIF will involve mixed motives "because the plaintiff would be alleging the employer had both a legitimate reason (the economic need to reduce the workforce) and an illegitimate reason (to terminate an employee based on his or her age)"; such a rule would incorrectly force every RIF case into a *Price Waterhouse* framework. *Starceski*, 1995 WL 254804, at *5 (citation omitted). Rather:

> . . . the distinction between a *Price Waterhouse* and a *McDonnell Douglas/Burdine* case lies in the kind of proof the employee produces on the issue of bias. In the former, direct evidence of discriminatory animus leads not only to a ready logical inference of bias, but also to a rational presumption that the person expressing bias acted on it.

Id. at *5.

On certiorari, Gehring now relies on the alleged stray remark of preliminary decision-maker Watson as "mixed motives" evidence, *see* Petition at 3. This, still, does not suffice.

Price Waterhouse left *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) intact. *Price Waterhouse*, 490 U.S. at 245 ("Our holding casts no shadow on *Burdine*. . . . ")

(plurality opinion); *Id.* at 261 ("The evidentiary rule the Court adopts today should be viewed as a supplement to the careful framework established in our unanimous [decision in *Burdine*]. . . . ") (O'Connor, J., concurring). Thus, both before **and after** *Price Waterhouse*, a plaintiff in a disparate treatment case can proceed by offering direct evidence of discrimination, or indirectly by offering proof of pretext. ("Our opinions make plain that *Burdine* applies to all individual disparate-treatment cases, whether the plaintiff offers direct proof that discrimination motivated the employer's actions or chooses the indirect method of showing that the employer's proffered justification is false, that is to say, a pretext.") *Price Waterhouse*, 490 U.S. at 288 (Kennedy, J., dissenting) (quoting *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 at n. 3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence.")). Gehring explicitly followed the *Burdine* methodology at trial, arguing to the jury that he presented both circumstantial and direct evidence (the alleged stray remark) of discrimination. Case App. 16-18.

Not every disparate treatment case is a mixed motives case. *Price Waterhouse* (self-evidently); *see also Miller v. Cigna Corp.*, 47 F.3d at 597, n. 9 (In most ADEA cases reaching the jury, the record will support an inference that both a legitimate and illegitimate reason played a role in the employer's decision, but these cases differ from true *Price Waterhouse* mixed motives cases, where "not only [does] the record [support] a conclusion that both legitimate and illegitimate factors played a role in the employer's decision, but . . . the plaintiff's evidence

of discrimination is sufficiently 'direct' to shift the burden of proof to the employer on the issue of whether the same decision would have been made in the absence of the discriminatory animus.").

Gehring's proffered evidence, qualitatively, does not meet *Price Waterhouse's* test. Mixed motives evidence must be clear and substantial; moreover, remarks by a decision-maker must be linked, temporally and factually, to the decision at issue. *Armbruster*, 32 F.3d at 779, n. 15 (alleged statement by division president (and apparent ultimate decision-maker) two years prior to the decision at issue that "I don't want any over 50 burnouts promoted" is too temporally distant and not linked to decision at issue); *Hook v Ernst & Young*, 28 F.3d 366, 375 (3rd Cir. 1994) (finding sexual comments by plaintiff's supervisor insufficient for a mixed motives charge because they had nothing to do with plaintiff's job performance and were unrelated to the adverse decision process challenged in the case); *cf. Hazen Paper Co. v. Biggens*, ___ U.S. ___, 113 S. Ct. 1701, 1706 (1993) (age must have "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome" of that process). The alleged stray remark on which Gehring relied was never connected to the decision at issue; and, as the district court observed in close of evidence motions, it does not necessarily correlate with age discrimination, even if made. Case App. 14. (Younger and older employees can become lazy.)

Gehring's is not a mixed motives case and was not presented as one. At trial, his position was that the RIF was a dual motive for his discharge, and that the alleged stray remark of Watson was ***Burdine*** direct evidence. He

first implies that the latter is *Price Waterhouse* "mixed motives" evidence on certiorari, but the claimed remark does not even marginally meet *Price Waterhouse's* test.

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH *PRICE WATERHOUSE* AND THE COURT'S SUBSEQUENT DECISIONS IN *HAZEN PAPER CO. v. BIGGENS* AND *ST. MARY'S HONOR CENTER v. HICKS*

Gehring's ultimate argument is that in any ADEA case where more than one motive is at play, a but-for causation instruction that does not also tell the jury that age need not be the sole factor is flawed under *Price Waterhouse* and *Hazen Paper*. *See* Petition at 9 & 15 (the district court and the Court of Appeals erred in imposing a but-for standard of causation where "multiple motives [are] at play") (*Hazen Paper* cited at 15). As stated, at trial, the "multiple motives" were the RIF and age; Gehring now recasts them as age and some legitimate factor.

Gehring misses the point, because *Price Waterhouse* had nothing to do with other than a very limited number of true, mixed motives cases.[10] Discrimination cases

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[10] Gehring's related argument that the district court's "business judgment" instruction effectively told the jury that it must override a finding of age discrimination "if Case produced a legitimate reason for the termination," and guaranteed a verdict for Case, Petition at 17, misstates the instruction and is senseless.

The business judgment instruction is reproduced at Case App. 7. The district court gave this instruction to focus the jury on whether Case engaged in age discrimination, not whether it would have made the same decision as an employer.

inherently involve multiple motives: the motive the employee asserts, and the motive the employer asserts. *Miller v. Cigna Corp*, 47 F.3d 586, 597 at n. 9 (3rd Cir. 1995). Some merit to the employee's claim must exist for the case to reach the jury. *Id.* The jury's goal is to isolate the effect, if any, of the claimed improper motive, i.e., age.[11]

It followed the main instruction, which told the jury that it was to decide "whether plaintiff has shown by the greater weight of the credible evidence that he would not have been let go had it not been for his age." (Quoted in *Gehring* opinion below at Petition A43.) It told the jury that in deciding **this question,** it must ignore their opinions, if any, on "whether [Case] exercised good business judgment in eliminating [Gehring's] position" and instead focus on whether Case had a legitimate, non-discriminatory reason for its action or acted because of Gehring's age (as the district court told the jury in the immediately preceding principal instruction). The question of whether the jury **agreed with** Case's reason is distinct from whether intentional discrimination was the reason for Case's decision. *See St. Mary's*, 113 S. Ct. at 2752.

[11] Gehring asserts that the jury's question about the meaning of "a determining factor" shows that it believed age was a factor in Case's decision, *see* Petition at 5; but his conclusion does not necessarily follow from the question.

Equally, the jury may have viewed **the RIF** as a determinative factor to Gehring's discharge (exactly what Gehring argued to the district court), and wondered how or if there can be more than one "determining factor" – or but-for cause. The jury, which was well-educated, may have simply wanted a precise understanding of the term before it applied the facts. Or, maybe the jury thought Gehring had a bad attitude (which, to an extent, he did).

The important point is that the response – that age must be a but-for cause of the decision – given by the district court and adopted by the Court of Appeals properly responded to the inquiry, regardless of the context of the jury's question.

The Court of Appeals' analysis is consistent with this Court's analysis in *Hazen Paper*, *St. Mary's* and *Price Waterhouse*.

In *Hazen Paper*, the Court addressed the relationship between the standard of ordinary liability under the ADEA and the standard of liability for liquidated damages under the ADEA's provision for willful violations. In reviewing the case law governing disparate treatment cases, the Court reiterated that the ADEA's standard for ordinary liability is but-for causation. *Hazen Paper*, 113 S. Ct. at 1706 ("Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.").

In *St. Mary's*, the Court addressed a Title VII case in which multiple motives were at play, which it characterized as a **pretext** case, not a *Price Waterhouse* case. The possible reasons for the plaintiff's demotion and discharge were: race (plaintiff's claim); threats and violations of the employer's rules (employer's stated reasons); and personal animosity toward the plaintiff (what the district court, as the trier of fact, found probably motivated the adverse decision). *St. Mary's*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991); *see also* 113 S. Ct. at 2748.

The Court affirmed the district court's judgment in favor of the employer, holding that pretext does ***not*** automatically equate to discrimination. Rather, the plaintiff in a disparate treatment case – even one involving multiple motives – retains the "ultimate burden of persuading the [trier of fact] that [he] has been the victim of

intentional discrimination," i.e., that discrimination was the true reason for the employment decision. *St. Mary's*, 113 S. Ct. at 2747-48. *See also Armbruster*, 32 F.3d at 783 ("After *St. Mary's* . . . the trier of fact cannot find for the plaintiff merely because it disbelieves the defendant's proffered explanation; it must **also** be persuaded that the employment decision was the result of the bias that can be inferred from the falsity of the defendant's explanation.") (emphasis supplied).

Hazen Paper and *St. Mary's* make clear that even in multiple motives disparate treatment cases (what most disparate treatment cases are about), but-for causation remains the pivotal consideration; and that true *Price Waterhouse* cases are cases not only where the record supports a conclusion that both legitimate and illegitimate factors played a role in the employer's decision, "but where the plaintiff's evidence of discrimination is sufficiently 'direct' to shift the burden of proof to the employer on the issue of whether the same decision would have been made in the absence of the discriminatory animus." *Miller*, 47 F.3d at 597, n. 9; *Id.* at 606 (concurring opinion).[12]

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[12] The hypothetical illustration of the Third Circuit in *Miller*, based on *St. Mary's*, is precisely what the *Gehring* Court of Appeals illustrated. In a pretext case, the fact finder may conclude that the alleged discrimination (e.g., age) and the employer's non-discriminatory explanation (e.g., absenteeism) both played a role in the employer's decision. It must then isolate the effect of the factor of age. It may find "that the plaintiff's absenteeism record played a part, but that the plaintiff would not have been fired if he or she were twenty years younger" – and thus find discrimination. *Miller*, 47 F.3d at 597. Or, it may find the converse true, i.e., that the same result would

Although Gehring says a court must explicitly instruct a jury that age need not be the sole factor to the employer's decision (even assuming a non-*Price Waterhouse* multiple motives case[13]), in addition to instructing it that it must be a but-for consideration to the decision, there is nothing about the Court's decisions in *Hazen Paper* or *St. Mary's* that supports this position. A jury need not duplicitously be told both what the employee must prove and, inversely, what the employee need not prove, **to prove** intentional discrimination.

This case does not present unique issues. The district court's and the Court of Appeals' formulations both fully embrace this Court's but-for causation standard of "actually played a role" and had "a determinative influence" on the decision, *Hazen Paper*, 113 S. Ct. at 1706; and to prove "intentional discrimination," *St. Mary's*, 113 S. Ct. at 2748. *Gehring* opinion below; Petition at A48-A49 (A determining factor means the plaintiff must prove he "would not have been let go [but-] for his age" – "had [he

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have occurred **even if** the employee were twenty years or younger – and thus find no discrimination. *Compare Gehring* opinion below; Petition at A49-50 (Our proposed instruction "tells the jury what to do if it finds that the employer took more than one thing into account;" [and the court's hypothetical constructs based on interplay of four possible variables]).

[13] Gehring's position fails even if his were a true *Price Waterhouse* mixed motives case, as the ingredient he claims is missing here – an explicit statement that age need not be the sole factor – is not what makes a proper *Price Waterhouse* mixed motives instruction. *See Miller*, 47 F.3d at 597, n. 9; *Armbruster*, 32 F.3d at 777-78 (discussing components of a true *Price Waterhouse* mixed motives instruction).

or she] been younger than 40 and everything else had remained the same."); *see also Miller*, 47 F.3d at 595, 597.

IV. THE COURTS OF APPEALS ARE NOT IN CONFLICT

The Courts of Appeals are not in conflict over the proper standard for but-for causation in ADEA cases. They have adopted different formulations to embrace the same concept. Some have interchanged the causation terms "but-for" and "a determining factor," (*Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979); *Spagnuolo v. Whirlpool Corp*, 641 F.2d 1109, 1112 (4th Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F. 2d 974, 984 (9th Cir. 1981)) (Petition at 20); others use the more lay terms of "made a difference," what the Court of Appeals suggested here. *Smithers v. Bailar*, 629 F.2d 892, 897 (3rd Cir. 1980) (and other authorities cited in Petition at 21).[14]

These variations are no different from phrases the Court uses to convey but-for causation.[15] This Court need

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[14] The court in *Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 393-94 (8th Cir. 1992), *vacated*, ___ U.S. ___, 114 S. Ct. 42 (1993) (for reconsideration of issue of willfulness in light of *Hazen Paper*) (*on remand*, 12 F.3d 845 (8th Cir. 1994)), did not recently "develop yet another standard," as Gehring suggests. Petition at 21. In reviewing an instruction using the phrase "motivating factor," the *Glover* court merely suggested that the jury be told to focus on whether the same decision would have been made regardless of the plaintiff's age. *See Gehring* opinion below; Petition at A51.

[15] *See Price Waterhouse*, 490 U.S. at 258 ("motivating" factor) (plurality opinion); *Id.* at 259 ("substantial factor") (White, J., concurring); *Id.* at 276 ("made a difference") (O'Connor, J.,

not undertake review merely to give micro-phraseology that may not work for every case. *Cf. Gehring* opinion below ("We do not want to tie the judge's hands; language works best if it responds to the nature of the precise dispute between the parties."). Petition at A51.

Gehring inaccurately states that all circuits addressing the issue have held that an ADEA jury **must explicitly** be told that age need not be the sole factor to the adverse decision. Petition at 22. Courts making this statement have done so in the context of otherwise inaccurate instructions, and required the additional statement **to correct the inaccuracy**; *see Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 & n. 6 (6th Cir. 1975) (district court did not instruct jury on "but-for" test but simply told jury to focus on whether the plaintiff "was discharged from his job because of his age"); *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1316 (9th Cir. 1992) (district court "completely failed to give any guidance as to the meaning of 'determining factor' "); or they have done so in passing comment, *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86 (2nd Cir. 1983) (defendant's challenge that the district court did not meaningfully guide the jury on the concept of a "determinative factor" is unmerited, since the district court explained that age at all events must be a "but-for" factor) (all cited in Petition at 22-23 and (by Gehring) to the Court of Appeals). The *Gehring* district court **twice** explained to the jury that age must be a but-for factor. Petition at A43, A44, A49.

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concurring); *Hazen Paper*, 113 S. Ct. at 1706 ("actually played a role . . . and had a determinative influence"); *Id.* at 1710 (was "a determinative factor"); *St. Mary's*, 113 S. Ct. at 2752 ("was the real reason").

Gehring's comparison of *Golomb v. Prudential Insurance Co. of America*, 688 F.2d 547 (7th Cir. 1982) and *Mayall v. Peabody Coal Co.*, 7 F.3d 570 (7th Cir. 1993), to the *Gehring* opinion is equally inaccurate. *See* Petition at 23-24.

In *Golomb*, the court reiterated that the salient points of a proper ADEA instruction are that age be "a determining" factor, and that this means "but-for" causation; and then suggested that district courts **may** also want to state that age need not be "the sole determining factor." *Golomb*, 688 F.2d at 552, n. 2. In *Mayall*, the court found that "[t]he phrase 'a determining factor' ha[d] [a] clear meaning **in the otherwise proper instructions**." *Mayall*, 7 F.3d at 574 (which incorporated "but-for" standard (as an affirmative defense)) (emphasis supplied); *Id.* at 573, n. 3 (if defendant has proved age was not a but-for consideration, the verdict should be for the defendant). The *Gehring* Court of Appeals merely suggested further simplification, since coupling the phrase "determining factor" with "but-for" causation makes use of the phrase "determining factor" unnecessary. *See* Petition at A49 ("**In these instructions** 'determining factor' carried no weight.") (emphasis supplied).

Review is not necessary, because there is no conflict among the Courts of Appeals.

V. *ST. MARY'S HONOR CENTER v. HICKS* DOES NOT REQUIRE CLARIFICATION

Gehring's last basis for review is substantially without merit. The Court of Appeals correctly ruled that a jury need not be instructed on permissible inferences, much

less full presumptions governing disparate treatment cases. *See* Petition at A41-42, citing *United States v. Sblendorio*, 830 F.2d 1382 (7th Cir. 1987) (addressing issue in the context of Gehring's other request for a *McDonnell Douglas* paradigm instruction, rejected under the dearth of authority deciding that one should not be given).

The reasoning why a paradigm instruction should not be given holds true for *St. Mary's* **permissive** inference based on a finding of pretext. *See St. Mary's*, 113 S. Ct. at 2749. It is simply another inference arising from the shifting burdens of production in disparate treatment cases.[16]

Gehring seizes on the Court's statement in *St. Mary's* that clarity regarding the requisite elements of proof is important. Petition at 28-29.

This statement (which the Court made in closing to respond to the respondent's argument that the Court's

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[16] Gehring's *St. Mary's* instruction is produced at Case App. 8, and was not fairly worded or accurate. It did not adequately embrace *St. Mary's* critical basis that the jury must find **both** pretext and that discrimination was the real reason for the employment decision. *St. Mary's*, 113 S. Ct. at 2747-48 and at 2749, n. 4; *Armbruster*, 32 F.3d at 783.

The district court did not use a *St. Mary's* instruction as to do so would have imbalanced the district court's dispositive single instruction (quoted in Petition at A43) and would inevitably have led to a paradigm instruction, once the process of adding various pieces on shifting burdens and presumptions started. *See* Case App. 18-19.

Instead, the district court permitted Gehring to argue, as he would regardless of *St. Mary's*, and as he did argue, a *St. Mary's* permissible inference. *See Gehring* opinion below; Petition at A42.

decision was ill-advised, given the right to a jury trial in Title VII cases created by the Civil Rights Act of 1991, *St. Mary's*, 113 S. Ct. at 2756), relates to clarity in the **elements of proof**. The element of proof established by *St. Mary's* is that *"there must be a finding of discrimination."* *Id.* at 2742 n. 4 (emphasis original); (" '[T]he ultimate question [is] discrimination, *vel non*.' "); *Id.* at 2753 (citations omitted).

Thus, *St. Mary's* established as **an element of proof** that "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason," *Id.* at 2752 (emphasis original) – quite different from what Gehring wanted the district court explicitly to tell the jury.

Gehring's construction of *St. Mary's* is wrong. The import of *St. Mary's* is to focus the jury not on a permissive inference but on whether **all of the evidence**, in combination, "suffice[s] to show intentional discrimination." *Id.* at 2749.

The Court of Appeals' decision comports with *St. Mary's*. It does not force juries "to guess as to the type of evidence [that is] required to prove [intentional] discrimination," Petition at 31. *St. Mary's* is clear.

CONCLUSION

Respondent J.I. Case (Case Corporation) respectfully requests that the Petition for Writ of Certiorari be denied. The Petition presents no novel issues, conflicts among the circuits, or other justification for further review; and the lower courts' rulings are not in error.

Respectfully submitted: June 7, 1995.

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CASE'S SUPPLEMENTAL APPENDIX

Gehring Substantive (Pretext) Instruction
..... Case App. 1

Gehring Court of Appeals Initial Brief (Excerpt)
..... Case App. 2

Gehring Court of Appeals Reply Brief (Excerpt)
..... Case App. 4

Case Court of Appeals Response Brief (Excerpt)
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District Court "Business Judgment" Instruction
..... Case App. 7

Gehring *"St. Mary's"* Instruction
..... Case App. 8

Trial Transcript Excerpts (Quoted Passages)
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GEHRING SUBSTANTIVE (PRETEXT) INSTRUCTION

* * *

If plaintiff has proven [a *McDonnell Douglas prima facie* case], he has proven enough so that you may, but you need not, render a verdict in his favor. If the plaintiff has failed to prove one or more of [the *McDonnell Douglas prima facie* case elements], you must find for the defendant.

If you find that plaintiff has proven these facts and that the defendant has not produced a reason other than age for the discharge, then you must find for the plaintiff.

If, on the other hand, defendant has produced evidence of a reason other than age for discharging plaintiff, you must find for the defendant unless you find, considering all the evidence in the case, that plaintiff has proved that the reason given by the defendant was not the true reason for plaintiff's discharge, or that the plaintiff's age more likely than not was a determining factor in his discharge.

[R. 48:5-6]

GEHRING COURT OF APPEALS INITIAL BRIEF (EXCERPT)

* * *

[p. 12] **ARGUMENT**

I. The District Court Erred In Refusing To Instruct The Jury That Age Did Not Have To Be The Only Factor Motivating The Defendant To Terminate Gehring's Employment

In an age discrimination case, the court should be sure to instruct the jury on the two factors critical to the jury's understanding of the phrase "a determining factor:" First, that there can be more than one determinative factor in the employer's decision and, second, that age must be a factor in the absence of which the plaintiff would not have been discharged. *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76 (2nd Cir. 1983). The importance of instructing the jury in this manner was emphasized in *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975) where the Sixth Circuit explained: . . . .

* * *

[p. 13] In instructing the jury in this case, the District Court failed to protect against the mistaken inference that age had to be the sole factor in Gehring's discharge. While the court instructed the jury that age had to be a but for cause of Gehring's discharge, the court completely failed to advise the jury that age did not have to be the sole factor in the discharge. This incomplete instruction . . . was worse than no instruction at all.

* * *

[p. 18] [T]he court nonetheless responded to the jury's question with an instruction that. . . . This was tantamount to instructing the jury that the phrase "a determining factor" really meant the sole factor.

Third, the development of Title VII case law shows that the phrase "a determining factor" has anything but a clear meaning. To the contrary, the meaning of this phrase has generated endless confusion and dissension among the courts. The United States Supreme Court itself noted that this very issue had "to say the least, left the circuits in disarray." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 238 n.2, 109 S.Ct. 1775 (1989). The Supreme Court, moreover, after noting this disarray and issuing what purported to be the final word on this issue, was itself overruled by Congress' enactment of the Civil Rights Act of 1991. . . .

* * *

GEHRING COURT OF APPEALS REPLY BRIEF (EXCERPT)

[p. 8] [T]he court's "but for" instruction . . . was not only initially given to the jury but was erroneously and prejudicially repeated a second time in response to the jury's question.

The concept that age must be a but for cause of the discharge decision is analytically distinct from the concept that age does not have to be the sole cause in order for the plaintiff to prevail. As Chief Justice [sic] Kennedy noted in a Title VII case:

> We are told . . . that but for cause is not required, since the words "because of" do not mean "solely because of" . . . *No one contends, however, that . . . sex must be the sole cause of the decision before there is a Title VII violation. This is a separate question from whether consideration of . . . sex must be a cause of the decision.* Under the accepted approach to causation that I have discussed . . . sex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. Discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, i.e., a but for cause.

Price Waterhouse v. Hopkins, 490 U.S. 228, 284 (1989).

While the defendant erroneously argued. . . .

* * *

CASE COURT OF APPEALS RESPONSE BRIEF (EXCERPT)

[p. 37] There is no need to overrule *Mayall*. The court need only consider Gehring's own argument on page 15 of his brief, which is entirely circular in logic:

> While the district court's use of the phrase "a determining factor" in the jury instructions and special verdict **told the jury that other factors could also enter into the discharge decision** – the court's further instruction that age had to be a but for cause of the discharge told the jury just the opposite.

(Emphasis supplied.)

The court did not have to tell the jury that there can be more than one factor, but it must be a determining factor . . . but, then again, there can be more than one factor; but it must be a determining factor, *ad infinitum*. The court accurately conveyed to the jury, as Gehring concedes, that there can be more than one factor – but age must be a determining or "but for" factor. What Gehring complains of are at best amplifications of the correct statement of the law the court gave; but "once the court [correctly states] the law it [is] not error to refuse . . . more icing on the cake." *Lee v. Rapid City Area School Dist. No. 51-4*, 981 F.2d 316, 331 (8th Cir. 1992) (en banc) (original panel decision) (claim in ADEA case that instructions "did not sufficiently expound on all the ramifications of plaintiff's burden of proving that he would not have been discharged but for his age.").[19]

* * *

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[19] Gehring's arguments about *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and the Civil Rights Act of 1991 (addressing

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Price Waterhouse), *see* Gehring brief at 18 [this Appendix at 3], are difficult to follow, but neither has application here. *Price Waterhouse* was a true mixed [p. 38] motive case, i.e., where illegitimate considerations (gender) conclusively played a part in the decisional process, but the employer asserted that for legitimate reasons its ultimate decision would have been the same. This is not the case here.

Gehring argued that his was a mixed motive case, requiring undue focus on multiple factors in instructing the jury, because:

> There can be two determining factors . . . For instance, in this case to use a real good example, but for the reduction in force his age wouldn't have made any difference. It had to be a combination of two determining factors. One, a reduction in force. The decision would not have happened without that. One, the fact that he was old and both are -- they are necessary for the equation. Both have to be there in order for there to be discrimination or he wouldn't have been terminated.

R. 91: 71, lines, 16-24.

The trial court correctly observed:

> We assume the reduction in force. All we are trying to isolate out of this picture is assuming a reduction in force and a necessity to fire three people, what was it that made this person one of the three? So sure, of course, without a reduction in force none of us would be here in this courtroom arguing this case. So that isn't -- the determining factor in why Dale Gehring was picked as one of the three is in your view his age and in defendant's view something else.

R. 91: 71, line 25; 72, lines 1-9; *see also* R. 88: 149, lines 20-25; 150-153, line 23 (similar colloquy).

DISTRICT COURT "BUSINESS JUDGMENT" INSTRUCTION

In determining whether plaintiff has proven that defendant intended to discriminate against plaintiff because of his age, I instruct you that the question is not whether defendant exercised good business judgment in eliminating plaintiff's position, or whether you agree or disagree with defendant's reason. Defendant was allowed to take its action so long as defendant had a legitimate, non-discriminatory reason.

[R. 76:11]

GEHRING *"ST. MARY'S"* INSTRUCTION

MS. KENNELLY: I do have one that I would like to propose that's based on the *Hicks* decision. It's taken almost verbatim from the Opinion on Page 8.

If you find that the reasons given by the defendant for selecting plaintiff for termination were not the true reasons, you may infer the defendants intended to discriminate against the plaintiff. However, while a discriminatory motive may be inferred from this fact alone, you are not compelled to draw this inference.

* * *

[R. 88:142, Lines 1-9 (Tr. 3-A-142)]

VON RUEDEN – DIRECT

* * *

A Basically Dale's strength has always been his supervisory skills. He's very good at organizing, that type of thing.

As far as the day-to-day type of activities, he's probably not as proficient as other people that we've had in that position. . . .

As far as the detail, that was never really one of his strengths. That's something that he generally was able to have the people that he worked with to help him out with some of that stuff.

* * *

[R. 89:103, Lines 16-20 (Tr. 2-B-103); R. 89:104, Lines 9-12 (Tr. 2-B-104)]

WELLMAN – REDIRECT

* * *

Q Mr. Wellman, based upon your years at the facility and working with Mr. Gehring, do you have your or a view as to whether Mr. Gehring was good or interested in doing detailed work?

MR. FOX: Object to that as beyond the scope of cross.

THE COURT: Overruled.

THE WITNESS: I believe that Dale or my observations and a number of my people --

THE COURT: No, don't. Just on your own, on our own observations.

THE WITNESS: Okay, excuse me. Excuse me, Your Honor. I believe that Dale was more interested in having meetings and discussing things than the on-hand gritty work.

MR. SHINDELL:

Q Did you finish your answer?

A This is from basically observations, that they would go into meetings and spend several hours at least once a week in discussing -- and they would call it a departmental meeting. And they would go in and discuss different things.

* * *

[R. 88:130, Lines 18-25 (Tr. 3-A-130); R. 88:131, Lines 1-11 (Tr. 3-A-131)]

WATSON – DIRECT

* * *

A We come back that the focus or the task was how to get the job done and continue the contribution with less people. We had daily routine tasks, we had special projects.

* * *

[R. 88:57, Lines 7-9 (Tr. 3-A-57)]

WATSON – DIRECT

* * *

Q Did Mr. Gehring have in your judgment the technical competence to perform Mr. Gesicki's or Mr. Matuszewski's positions in June 1991?

A Yes, he did [but]. . . .

In my sense of observation, although there was a technical competence, there was a reluctance on Dale's part to do the daily routine boring work, as some people may refer to it.

So although he provided a valuable service as a special project guy, could we get by without it? Would it

hurt us less without the special projects as the day-to-day? It would hurt us less.

* * *

[R. 88:56, Line 25 (Tr. 3-A-56); R. 88:57, Lines 1-3; 10-16 (Tr. 3-A-57)]

GESICKI – CROSS

* * *

Q Isn't it correct that within a couple of days of Mr. Gehring's position being eliminated, you spoke with Mr. Watson about why he made the selection he did in Mr. Gehring's case?

A It was within a couple of hours after Gehring was eliminated.

Q In fact, you expressed -- I don't know that you physically barged into Mr. Watson's office. But in essence you came to Mr. Watson immediately and expressed your sentiments about the decision.

A That's correct.

Q And isn't it a fact that Mr. Watson gave you an explanation for his decision? And among other things, he indicated that Mr. Watson -- Mr. Gehring, rather, was an Accountant II. He said that to you?

A He did say he was an Accountant II, yes.

Q And Mr. Watson said that there was some issue concerning Mr. Gehring's ability to do some detailed

thing concerning converting Brazilian currency into U.S. currency?

A He stated some fact like that, yeah, that he kept --

Q Just answer my question, sir.

A Yes.

MS. KENNELLY: Let the witness -- could you please let the witness finish his answer?

THE COURT: It's cross-examination, and the cross-examiner can cut him off if he thinks he's answering more than the question asked for.

MR. SHINDELL:

Q And isn't it a fact that Mr. Watson also said as the third basis or explanation that he gave you at the time is that Mr. Gehring's function or the necessity for his function had been diminished to a large extent because of the conversion to the CMS computer program? He also told you that.

A It was not a CMS computer program, it was a special program that Dale Gehring and the computer people had designed to do some costing that had been misunderstood evidently by Mr. Watson.

Q In any event, within a couple of minutes or within an hour of the decision being made or your learning of it, this is what Mr. Watson told you as the explanation for his --

A Yes.

* * *

[R. 90:97, Lines 10-25 (Tr. 1-B-97); R. 90:98, Lines 1-24 (Tr. 1-B-98)]

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* * *

We submit the case for directed verdict, Your Honor.

THE COURT: Thank you. I share some of the opinion that you expressed last, and that is that I have trouble or I don't think there is a perfect correlation between saying someone retired before his time and age discrimination.

I think you are perfectly right that there are people that start out at Age [sic] 25 with no zest for their job and doing the least that can be expected of them, not asking for extra work. It certainly could be said they have retired before their time.

But what I'm interested in finding out from you, Mr. Fox, in particular, is whether you have anything besides this one remark. . . .

* * *

[R. 87:59, Lines 15-25 (Tr. 2-A-59)]

MATUSZEWSKI - CROSS

* * *

Q And do you remember saying to the effect: No problems. Grew to learn [Watson's] needs and wants. And once you did that, you were comfortable working with him, meaning Ray Watson.

A Yes.

Q And do you remember saying that he was honest and fair?

A Yeah.

* * *

[R. 90:111, Lines 14-19 (Tr. 1-B-111)]

PROCEEDINGS FOLLOWING JURY QUESTION

* * *

[Mr. Fox:] There can be two determining factors even without a compliance. For instance, in this case to use a real good example, but for the reduction in force his age wouldn't have made any difference. It had to be a combination of two determining factors. One, a reduction in force. The decision would not have happened without that. One, the fact he was old and both are -- they are necessary for the equation. Both have to be there in order for there to be discrimination or he wouldn't have been terminated. . . .

THE COURT: . . . [W]e assume the reduction in force. All we are looking at and what we are trying to isolate out of this picture is assuming a reduction in force and a necessity to fire three people, what was it that made this person one of three? So sure, of course, without a reduction in force none of us would be here in this courtroom arguing this case. So that isn't -- the determining factor in why Dale Gehring was picked as one of the three is in your view his age and in defendant's view something else.

MR. FOX: That is true but. . . . Age has to be a factor that tips the scale. It has to be a but for factor. Even taking this reduction in force, they could say, Well, it was age plus the type of job he had. . . . If he was a younger man . . . in that particular job, he wouldn't have been the one selected;. . . .

* * *

[R. 91:71, Lines 16-25 (Tr. 3-B-71); R. 91:72, Lines 1-9, 12-15, 17-19 (Tr. 3-B-72)]

GEHRING OPENING

* * *

How do you prove a case of age discrimination? We all recognize that there is a law that prohibits terminating somebody or somehow disadvantaging them in a place of employment because of their age. Because of the general awareness of that law, it is very difficult to prove cases by what we call direct evidence. The Judge in her opening

remarks referred to two types of evidence, circumstantial and direct evidence. In age discriminating [sic] cases you almost always find proof by indirect evidence. The indirect evidence that we have to offer. . . .

We also believe we have direct evidence in this case. . . .

* * *

[R. 86:3, Lines 17-25 (Tr. 1-A-3); R. 86:4, Lines 1, 7 (Tr. 1-A-4)]

GEHRING CLOSING

* * *

As I told you at the beginning of this case, there are two ways that I intended to prove this. One of the ways is by showing that Dale is over 40 years of age and in this case at the time he was terminated from his employment he was 52. That he was qualified for a job for which he was terminated and he was qualified for other jobs that remained at Case in Wausau after he left. That he was, in fact, the person selected for termination and the reasons he was selected, the one that have [sic] been offered, have been incredible and untrue.

* * *

. . . Let's [also] look at the direct evidence finally in the end.

* * *

[R. 91:9, Lines 14-22 (Tr. 3-B-9); R. 91:23, Lines 1-2 (Tr. 3-B-23)]

INSTRUCTION CONFERENCE

(In Relation To Gehring Proposed *"St. Mary's"* Instruction; See This Appendix At 8)

* * *

MR. SHINDELL: I guess we have two objections to that, Your Honor. One is that it suggests that there is evidence of discrimination but you need not draw the inference. Two is that it now places what the Court proposed of an imbalance, because the Court's question was evenly just. What is the bottom line question?

Now, we've beefed up the plaintiff's desired instruction, but we don't have a counterbalancing defendant burden instruction; and it's imbalanced now, or not in balance.

So we either have to start and stay with what the Court proposed. If they want to add theirs, then the defendant's entitled to one so that it puts -- and then you are back to basically the shift and instruction on the shifting burden of proof.

THE COURT: Yeah. I'm really tempted to stay with the simple one. You can certainly argue, just as you would anytime if somebody comes to you and says the reason I brought this sweater back to the store was because it

had a hole in it and it didn't fit me and it was the wrong color, but the real reason is they had already worn it six times and nobody said they liked it or something. You can always say: Look, those aren't the real reasons. That person said those reasons, but we know they're not the real ones. What do you think really happened up here in Wausau in June of 1991?

* * *

[R. 88:144, Lines 5-25 (Tr. 3-A-144); R. 88:145, Lines 1-3 (Tr. 3-A-145)]